Nos. 6, 11, 7, and 12

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In the Supreme Court of the United States

OCTOBER TERM, 1955

SECRETARY OF AGRICULTURE OF THE UNITED STATES,
APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

UTAH POULTRY & FARMERS COOPERATIVE,
APPELLANT

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

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OPINIONS BELOW

The opinion of the District Court (R. 105-144) is reported at 119 F. Supp. 346. The report of the Interstate Commerce Commission (R. 11-54) appears in 284 I. C. C. 377.

JURISDICTION

The final decree of the three-judge District Court was entered on May 7, 1954 (R. 149). The peti-

tion for appeal in No. 6 was presented and allowed on May 7, 1954 (R. 150). The petition for appeal in No. 11 was presented and allowed on June 8, 1954 (R. 159, 160).[1] Probable jurisdiction was noted on October 14, 1954 (R. 1288; 348 U. S. 807). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether tariff regulations providing that railroad carriers will be responsible for claims for physical damage to shell eggs only to the extent that such damage is in excess of specified percentages, without regard to the evidence as to actual responsibility, limit the carriers' liability and are therefore unlawful and void under Section 20(11) of the Interstate Commerce Act.

2. Whether the order of the Interstate Commerce Commission approving such tariff provisions is invalid for lack of adequate findings.

STATUTE INVOLVED

Section 20(11) of the Interstate Commerce Act, as amended (24 Stat. 379, as amended, 49 U. S. C. 1 *et. seq.*) is set forth in the Appendix, *infra*, pp. 41-45.

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[1] Appeal was taken in No. 6 from the District Court's opinion of March 10, 1954, as a precautionary measure, and is supplanted by the timely appeal from the "Final Decree" of May 7, 1954. It is settled, and not disputed, that the District Court could allow the second appeal, notwithstanding its earlier action allowing the precautionary appeal. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 177-178. The appeal in No. 6 should be dismissed.

STATEMENT

This is a direct appeal from the judgment of a three-judge District Court dismissing a complaint which sought to enjoin and set aside an order of the Interstate Commerce Commission. The contested order approved the inclusion in railroad rate schedules of provisions freeing the carrier from responsibility for damage to shell egg shipments, except to the extent that the damage exceeds certain specified percentages of each shipment, without regard to evidence as to responsibility for the damage.

The proceedings below were instituted by the Utah Poultry & Farmers' Cooperative against the Interstate Commerce Commission and the United States. The Secretary of Agriculture[2] and two large shippers of eggs (Armour & Co. and Swift & Co.) intervened as plaintiffs, and some 131 railroads intervened as defendants. The United States, although named as statutory defendant (62 Stat. 969, 28 U. S. C. 2322), filed answer in the District Court admitting the allegations of the complaint and opposing the damage tolerance rules

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[2] Section 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U.S.C. 1291), authorizes the Secretary of Agriculture to "make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same," with all of the "rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination." Similar authority is also conferred on the Secretary by section 203 (j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088-1089, 7 U.S.C. 1622) and section 17 (9) of the Interstate Commerce Act (54 Stat. 916, 49 U.S.C. 17 (9)).

established under the Commission's order. It now joins the Secretary of Agriculture in this appeal.

I. Summary of the Administrative Proceedings before the Commission

In 1948, the railroads, appellees herein, published new tariff schedules covering the shipment of shell eggs. The schedules specified the inspection procedure to be allowed at the point of delivery of shell egg shipments, and stated that as to certain shipments the railroad carriers would pay claims for damage only if the specified inspection procedure disclosed damage exceeding five percent of the shipment, and only to the extent of the excess.

Under protest by certain shippers, Division 2 of the Interstate Commerce Commission permitted the tariff to become effective on July 23, 1948, and then initiated an investigation into the problem of claims for damages to shell egg shipments. During the course of that investigation, the appellee railroads filed an amended tariff schedule, applying a graduated "tolerance" percentage to all categories of shell egg shipments, to become effective May 11, 1950. Upon protest by the Secretary of Agriculture, the Department of the Army, the private appellants herein and others, the proposed tariff was suspended, and the hearing on the protest was consolidated with the investigative proceeding, with the railroads named as respondents.

After hearing, on February 4, 1952, the Commission issued the order contested in this action, disapproving the tariff schedule as published, but

approving the filing of similar schedules amended to specify lower percentages of exemption.

The facts before the Commission, as shown by its report, are for the most part not in dispute.

a. *Damage claims on eggs transported by rail*

Though the perishable character of eggs is due both to fragility of the shell and the likelihood of internal damage or decomposition, damage from the latter cause is not in question in these proceedings (R. 26, 41). As to the problem of shell damage, which is of concern here, the Commission found that the carriers had been paying large claims, that such claims had increased substantially in cities along the eastern seaboard during the decade or so preceding its decision, and that "[i]n an effort to improve that situation" the railroads had proposed the contested tolerances—percentages of damage for which they would not be liable (R. 15, 22-28). The increased claims giving rise to these efforts were most marked in New York City, with lesser, though "large," claims accruing in Baltimore, Newark, Philadelphia, and other eastern cities. Generally, no increase was found to have occurred elsewhere than in such eastern cities. (R. 22.) The Commission rejected the suggestion of the railroads that the difference could be explained on the ground that receivers of eggs in the east were more "critical" than those in the rest of the country (R. 29-30).

During 1947, 9,656 cars of eggs were shipped to New York, Philadelphia, Baltimore, and Boston,

of which 7,638 (79%) were to New York. Of the total, there were 5,659 cars containing damaged eggs (so-called "claim cars"), and of these 5,044 (89%) were shipments to New York. Expressed in another form, the figures found by the Commission showed the following ratios of eggs damaged to eggs received in the eastern cities where the largest incidence of claims occurred:[3]

	Total received (dozens)	Total damaged (dozens)	Percentage damaged
New York (12 mo.)	137,484,000	3,179,003	2.31
Philadelphia (12 mo.)	12,006,000	69,700	.58
Baltimore (12 mo.)	12,420,000	108,371	.87
Boston (10 mo.)	11,898,000	71,221	.60
Totals	173,808,000	3,428,295	1.97

Contrasting with the increase in damage claims in the east for rail-transported eggs, the Commission found generally that "in the transportation of eggs by motor truck the amount of shell damage is negligible" (R. 39). Since the war, shipment of eggs by motor truck has increased greatly; in 1947, receipts in the eleven principal markets were 49% by rail and 51% by truck, whereas in 1950, 7% were rail and 93% truck shipments. In New York the change was from 70% rail shipments in 1947 to 13% in 1950. (R. 27.)

[3] The figures given in the text are computed from the tables in the Commission's report at R. 23 and 24; see also R. 1083. For comparison with the figures in dozens at R. 24, we have translated the figures for carloads at R. 23 into dozens. This is accomplished by multiplying each carload by 600, the number of cases, and 30, dozens per case, or 18,000 (R. 22, 24).

b. Packing and shipment of eggs

Eggs are handled on a wholesale basis by packers, the principal shippers, who may purchase either the farmer's "current receipts" eggs—*i. e.*, as gathered from the nest, without grading—or, as has been customary in recent years, "graded eggs"—*i. e.*, graded by the farmer, though with less rigorous inspection standards than those later applied by the packer (R. 19-20). Only a negligible amount of eggs is shipped by rail under either such classification (R. 19, 250-251, 382).

The bulk of eggs handled by wholesale packers are of two classifications: "storage packed" and "rehandled and repacked" (R. 19). Storage packed eggs are "candled"—placed before a candle lamp so that the contents may be seen—for damage otherwise invisible (R. 19-20), and "clicked"—one egg tapped against another, the sound revealing shell imperfections (R. 20). These eggs are packed in standard egg cases, under uniform packing standards (R. 28). The packer may instead visually inspect each egg, without candling, removing all eggs appearing damaged and packing the remainder in the same manner as "storage packed" eggs. These eggs are classed as "rehandled and repacked" (R. 19-20.)

The Commission found that "all egg-packing plants are operated in substantially the same manner" (R. 30), presumably whether operating at off-rail points or at points on the railroad. Packing standards are reasonably uniform (R. 30), the packers seek "to achieve perfection" (R. 31), and

no damaged eggs are deliberately included in packing (R. 32). The Commission also found, however, that careful inspection employed in packing unavoidably misses some imperfect eggs (R. 31). And usually there is no inspection by the railroads for concealed damage at the point of origin (R. 21).

In ten percent of egg shipments, inspection and grading are supervised by the Department of Agriculture. This supervision involves sampling carefully a random part of each shipment for departures from grading standards. (R. 31.)

c. Inspection at destination

Inspection procedures at the point of delivery differ from those at the point of origin (R. 21, 33-34). The Commission inferred from "the number and amount of claims" that "the inspection of shipments of eggs arriving at New York is being performed with a view to detecting all damaged eggs", and that such a volume of claims does "not appear to be based on a cursory inspection" (R. 34). However, the Commission also found the receivers' inspection at New York to be "merely visual," and described it in some detail as a "top-layer joint inspection," not involving an egg-by-egg examination even in repacking and reconditioning cases showing external signs of damage (R. 33). The Commission noted, in addition, that a substantial percentage of damage at origin is of a type that "could not be detected by the kind of inspection performed" at destination (R. 31).

The inspection at destination is necessarily con-

ducted under somewhat adverse conditions. Inspection must be performed upon arrival, jointly by carrier and consignee, prior to delivery to the consignee (R. 32-33), as required under the applicable tariff regulations (R. 50; and see prior regulations, R. 44, 47). The joint inspection involves visual inspection a layer at a time, halted at the first layer showing no damage (R. 33).

Comparing the effectiveness of inspections at origin and destination, the Commission referred to studies by the Department of Agriculture of loaded cars at the point of shipment. These showed that approximately 3.4 percent of the eggs were to be classed as imperfect at the point of shipment, although, of this amount, 1.9 percent represented "checks" found by candling and clicking which "could not be detected by the kind of inspection performed at New York." (R. 31.) Similarly, the Commission cited railroad surveys of loaded cars at different points of origin showing average percentages of damage ranging from 1.8 percent to 3.4 percent, with variations between shipments ranging from .93 percent to 7.26 percent (R. 32).

As to the effectiveness of the usual inspection at the destination, conducted jointly by carrier and consignee, the Commission referred to other surveys by the Department of Agriculture. These disclosed that after such inspections and acceptance by the consignee, and after reconditioning to remedy rail-caused damage, careful examination revealed previously undiscovered damage in amounts ranging from 3.5 to 7.3 percent. (R. 34,

236, 266-67, 280-81, 448-59, 467-71, 477-93, 508-16, 987.) While the Commission stated that these studies had not been shown to have been made before further handling (R. 34), there was undisputed testimony that the studies had been made "at the railroad dock" and that the "eggs had not been moved" (R. 485).

d. *Previous tolerance regulations*

The Commission's report also referred to tariff regulations in effect prior to 1948 (R. 13-15). There had been, since before 1919, a tariff rule exonerating carriers from a portion of the damage in shipments of "current receipts" eggs (R. 13). This had been approved by the Commission in 1919 on the basis of evidence that "the shippers ordinarily pack into cases of 30 dozen eggs [current receipts] approximately 18 broken or damaged eggs." *National Poultry, Butter & Egg Assn.* v. *New York Central Railroad Co.*, 52 I.C.C. 47, 49. In the same order, the Commission found no such practice with respect to other classes of egg shipments, and had concluded that as to such other classes a percentage rule would be "unreasonable and unlawful" (*id.* at 49, 59).[4]

e. *Decision of the Commission*

The Commission concluded that the regulations under consideration here were "designed to re-

[4] While the Commission made no finding on this subject in the instant case, undisputed evidence before it showed that few, if any, "current receipts" have been shipped commercially in recent years (R. 19, 250-251, 382).

lieve the carriers from paying claims for damages which are not attributable to their negligence," but were due to the "inherent nature" of the commodity transported (R. 40). Accordingly, the Commission held establishment of "tolerance" rules would not be unlawful (R. 43). However, it also concluded that percentages of tolerance smaller than those proposed would be "reasonable," and authorized the filing of new schedules containing the reduced percentages (R. 43). Specifically, the Commission ruled that, as to eggs rehandled and repacked and storage packed at the point of origin of the rail shipment, the tariff regulations might provide that the carrier would be responsible only for damage detected at destination which exceeds three percent of the eggs shipped, without regard to evidence as to responsibility (R. 42-3). As to eggs packed similarly but at off-rail points, the Commission concluded that the tariff could provide that the railroads would be liable only for damage detected at destination exceeding five percent of the shipment, again without regard to evidence of responsibility (R. 42). As to all other eggs (current receipts and graded eggs), the five percent rule was held applicable for shipments packed at both rail and off-rail points (R. 42).

Where the shipment of eggs is accompanied by a quality grading certificate of a Federal or State egg inspection agency showing the amount of imperfect eggs at the rail point of origin, the Commission approved a provision that the responsibil-

ity of the railroad would be only for damage detected by the joint carrier-receiver inspection in excess of the amount shown on the certificate, plus one percent (R. 41-2).

2. The Decision of the District Court

The three-judge District Court, Judge Knous dissenting, dismissed the complaint seeking to set aside the Commission's order (R. 105-144). The majority concluded that the tariff regulation establishing damage tolerances was "fair and reasonable," and that it constituted a "part of the whole problem of the rate structure" confided to the "expert experience and judgment of the Commission" (R. 135). Since the Commission had "found the fact that the tolerances do not include damages caused by the carriers," a finding "supported by substantial evidence," the court held that it was bound by the Commission's order (R. 135). Moreover, the court stated, the "tariff in this case is not a limitation of liability; it is no more than a factual determination of damage to eggs which is not caused by the carrier" (R. 135).

Judge Knous, dissenting, found it "inescapable" that the tariff regulations would operate to "limit the liability of the carrier," and concluded, accordingly, that they were in violation of "the prohibition of Section 20(11)" of the Interstate Commerce Act (R. 142).

3. The Interest of the Secretary of Agriculture

The Secretary of Agriculture is interested in this proceeding as the representative of the agri-

cultural community in the United States. Transportation rules and practices applicable to agricultural commodities are of great concern to the agricultural industry. See *The Transportation Problem of Agriculture*, 1940 Year Book of Agriculture, pp. 720-739. The Secretary of Agriculture is by statute authorized to "make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission" (7 U.S.C. 1291(a)). Similar authority is granted the Secretary to "cooperate with and assist cooperative associations of farmers making complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products" (7 U.S.C. 1291(d)).

It is the position of the Secretary of Agriculture, joined by the United States, that the Commission's order of February 4, 1952, approving tariff "tolerances" with respect to claims for damages to shell eggs, is invalid, and that the District Court erred in refusing to set it aside.

SUMMARY OF ARGUMENT

I

Section 20(11) of the Interstate Commerce Act makes carriers liable "for the full actual loss, damage, or injury * * * caused by" them to property they transport, and declares unlawful and void any contract, regulation, or other attempted means of

limiting this liability. The Commission, concerned over the large damage claims railroads were paying on egg shipments to the east, approved the tolerances in issue, prescribing stated amounts of damage for which the railroads would not be liable. But the only purpose and meaning of these tolerances is to reduce the liabilities the railroads bore under Section 20(11) as it operated without the tolerances. The rules are accordingly unlawful limitations of liability.

A. It is settled and undisputed that, as the Commission noted (R. 40), Section 20(11) codifies the common law rule imposing upon the carrier liability as an insurer for the "full actual" damage to goods it transports unless it can show affirmatively that the damage was caused by (a) an act of God, (b) the public enemy, (c) an act of the shipper himself, (d) public authority, or (e) inherent vice or defect in the goods. *E.g., Adams Express Co. v. Croninger*, 226 U.S. 491, 509; *C. & O. Ry. Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 421, 423; *Bills of Lading*, 52 I.C.C. 671, 679. The "full actual" loss must be recovered in every case; however "reasonable" or convenient, a device for measuring the recovery is invalid under Section 20(11) when it operates in any case to give the claimant less. *Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co.*, 253 U.S. 97; *Toker Co. v. Lehigh Valley R. R. Co.*, 12 N.J. 608.

B. The rules approved by the Commission can only serve to limit the liability demanded by Section 20(11). The tolerances the Commission au-

thorized assertedly rest upon "averages" or "normal expectancies" as to the amounts of damage to egg shipments for which carriers would not be liable under the agreed standard of Section 20(11). But these averages are then applied in every case so that even if a consignor ships perfect eggs in a given instance which are then broken through a cause for which the carrier is responsible, the carrier is automatically free of liability to the extent of the application of the tolerance rule. This is a startling reversal of the rule under Section 20(11); not only is the carrier relieved of its burden of proving that an excepted cause accounts for the damage, but the burden is conclusively presumed to have been met in every case with respect to the tolerance percentage.

To permit such a result would open the door to wholesale diminution of the rule under Section 20(11). With many or most commodities, there is presumably an "average" amount of damage in transit which might be shown to result from one of the causes for which the carrier is not liable. But the carrier must undertake to show in any given case that this excuse is present. If averages may be transmuted into universally applicable "tolerances," the carrier's burden is *pro tanto* eliminated and claimants in particular cases are necessarily denied the right Section 20(11) assures them.

II

Even if, contrary to our position, reasonableness could justify a tariff rule altering the operation of Section 20(11), the tolerances the Commission ap-

amendment has changed the common law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on his own line." *Cincinnati & Texas Pacific Ry.* v. *Rankin*, 241 U. S. 319, 326. And this meaning of Section 20(11), reaffirmed when the statute was strengthened by the Cummins Amendment of 1915,[6] has remained un-

[6] Senator Cummins pointed out that his amendment was designed, not to narrow the common law measure of liability, but only "to get rid of that part of the common law" which permitted "limitation upon the amount of recovery." 51 Cong. Rec. 9625; and see *id.* at 9778-9. The exact meaning of the statutory reference to damage "caused by" the carrier evoked discussion on the Senate floor, with some Senators expressing fear that the term could be understood to change the "standard of liability by the common carrier of freight" which should "remain that of an insurer" (51 Cong. Rec. 9625, 9780). It was proposed to change "caused" to "transported" in order to remove this possibility, a proposal viewed favorably by Senator Cummins (*id.* at 9625). However, discussion of this change revealed that it might increase the liability of the carrier beyond that of the common law (*ibid.*), and that "caused by" had been interpreted in the *Croninger* case and others to impose precisely the common law standards sought to be retained (*id.* at 9778-80). The proposal was withdrawn on this understanding and the original language of the Carmack Amendment re-adopted (*id.* at 9779-80).

Clearly recognizing that the phrase "caused by" did not limit the carrier's liability to cases of negligence, but covered liability without fault except where the specific excuses of the common law could be established, the Cummins Amendment permitted the carrier to require notice and filing of claim for losses where it was without fault but forbade such a requirement as a condition of recovery where the loss resulted from the carrier's negligence. See *Barrett* v. *Van Pelt*, 268 U. S. 85, 89-90; *C. & O. Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 422. The proviso forbidding the notice requirement in cases of negligence was repealed in 1930 (46 Stat. 251), but the repeal does not diminish the significance of the original provision in its demonstration of the scope of the liability under Section 20(11).

mistakably clear. See, *e. g.*, *Chicago & E. I. R. R. Co.* v. *Collins Co.*, 249 U. S. 186, 192-193; *Missouri, Kansas & Texas Ry.* v. *Harriman*, 227 U. S. 657, 672; *C. & O. Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 421-422; *Louisiana Southern Ry. Co.* v. *Anderson, Clayton & Co.*, 191 F. 2d 784, 785 (C. A. 5); *Lehigh Valley R. Co.* v. *John Lysaght, Limited*, 271 Fed. 906, 910 (C. A. 2), certiorari denied, 256 U. S. 704.

Accordingly, in an action to recover from a carrier for damage to property, the shipper establishes his *prima facie* case when he shows delivery in good condition, arrival in damaged condition, and the amount of his damages. Thereupon, the burden of proof is upon the carrier to show both its freedom from negligence and one of the excepted causes relieving it of liability. *Galveston, H. & S. A. Ry. Co.* v. *Wallace*, 223 U. S. 481, 492; *Chicago & E. I. R. R. Co.* v. *Collins Co.*, 249 U. S. 186, 191; *C. & O. Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 420-423. And even if it proves that such an excepted cause was present, the carrier must bear the entire loss unless it can show the amount of the damage thus explained. *Schnell* v. *The Vallescura*, 293 U. S. 296, 306-307.

In one respect at least, the carrier's liability was made more rigorous under the Interstate Commerce Act than it had been at common law. Where the latter permitted a carrier in certain circumstances to limit by contract the value of the goods for which it would be liable (*Adams Express Co.* v. *Croninger, supra*), the Cummins Amendment

prohibited any limitation of liability by any means whatsoever and declared any attempted limitation "to be unlawful and void."[7] Thus, Congress carried forward and stringently enforced the traditionally severe duty of the carrier designed "to secure the utmost care in the rendering of a service of the highest importance to the community." *Santa Fe, P. & P. Ry Co.* v. *Grant Bros. Constr. Co.*, 228 U. S. 177, 184-185.

The reach of the carrier's responsibility for the "full actual loss" in every case is demonstrated in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97. In issue there was a tariff providing that the amount of the loss of property for which the carrier should be liable would be measured by the value of the property at the time of shipment. The Interstate Commerce Commission had upheld this provision "as in no way limiting the carriers' liability to less than the value of the goods but merely offering the most convenient way of finding the value." (P. 99.) Holding the clause invalid, this Court concluded that the shipper was entitled to recover the full

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[7] In this respect, the statute "proved * * * more comprehensive than was found to be desirable" (*Adams Express Co.* v. *Darden*, 265 U. S. 265, 268) and was subsequently amended to permit limitation of carrier liability to an agreed valuation, provided the shipper was given a choice of rates approved by the Commission (39 Stat. 441). This provision has no application here. Cf. *New York, N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128; *S. E. Express Co.* v. *Pastime Co.*, 299 U. S. 28; *Lancaster* v. *McCarty*, 267 U. S. 427; *American Ry. Exp. Co.* v. *Lindenburg*, 260 U. S. 584; *Chicago, St. P. &c. Ry. Co.* v. *Latta*, 226 U. S. 519.

actual loss measured by what he "would have had if the contract had been performed" (p. 100). In response to the suggestion that the courts were "bound by the Commission's determination that the rule [was] a reasonable one," Mr. Justice Holmes' opinion for the Court observed that "the question is of the meaning of a statute and upon that, of course, the courts must decide for themselves." (P. 99.) Recognizing "the convenience of the stipulation in the bill of lading and the arguments urged in its favor," the opinion pointed out that the question was "how the contract operates upon this case. In this case it does prevent a recovery of the full actual loss, if it is enforced." (Pp. 99-100.) Because this was so, the general terms of the Cummins Amendment, admitting of no exception for any case, precluded enforcement.

In short, the statute, consistently interpreted as retaining the common law liability of carriers, leaves no authority with the Commission to relax this liability for the "full actual loss" in such case. If, as we believe, the Commission's approval of "tolerances" in this case effects such a relaxation, it cannot stand.

B. *The tariff regulations in question limit the carriers' liability and are therefore unlawful*

The Commission declared that a five percent tolerance for eggs packed elsewhere than at rail point of origin was justified because the "damage to such eggs for which [the carriers] are not responsible averages that amount" (R. 42). The

carriers, it pointed out (R. 41), claimed "that the normal expectancy of damage to eggs which have been rehandled at origin prior to tender for rail transportation is over 3 percent, and that the normal expectancy of damage in transit due to the inherent nature of the eggs, without negligence on the part of the railroad, is approximately 1 percent." On this basis, it concluded that the five percent tolerance for eggs not processed at rail point of origin "appears reasonable"; that a three percent tolerance "would be reasonable on eggs processed at the rail point of origin"; and that, in cases where Federal or State grading inspection showed actual damage at the point of shipment, a one percent tolerance for additional damage en route should be approved (R. 41-43).

Thus, figures based upon asserted "averages" and "normal expectancies" in a general mass of cases are made to govern each particular case, regardless of the particular facts, on the ground that they are thought to be a "reasonable" device for apportioning the cost of damage to eggs in rail transportation. On the basis of the Commission's own findings, it is clear that the result must be in some considerable number of cases to deprive shippers of recovery of the "full actual loss * * * caused by" the carrier within the meaning of these quoted words in the Interstate Commerce Act. Because this is so, the regulations are invalid. Specifically, the reasons for this conclusion may be stated as follows: (1) The proposed regulations serve no purpose except to change the result which would otherwise follow from Section 20(11), and

Congress conferred upon the Commission no power to effect any such alteration. (2) The effect of the regulations is to arm the carrier in every case with a conclusive presumption that three or five percent of the damage resulted from the shipper's acts, or that one percent resulted from inherent defects, despite anything the shipper may prove in the particular case and, more significantly, despite the fact that these are matters of defense on which the carrier has the burden of proof in each case under Section 20(11).

I. It is clear under this Court's decision in *Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co.*, 253 U.S. 97 (see pp. 14, 18, 24, 25, *supra*), that a tariff regulation, however "reasonable" and "convenient" it may be as a general proposition, cannot in any case limit or preclude the shipper's right to recover under Section 20(11). It is equally clear that the regulations in this case are designed for no other purpose. Indeed, as the Commission pointed out at length (R. 22-28), its concern and its resulting decision were prompted by the steep rise in recent years of damage payments on egg shipments to the east by railroads — contrasting dramatically with the "negligible" amounts of such damage in shipments by motor truck, to which the egg traffic has been increasingly diverted (R. 27-28, 37, 39). In other words, the results under Section 20(11) have been found unsatisfactory; the regulations approved by the Commission change them.

But the Commission has heretofore recognized its inability to alter the statute's operation, ac-

knowledging that the "liability of common carriers for the loss of or damage to shipments rests upon definite legal principles, and the enforcement of such liability is not within the jurisdiction of the Interstate Commerce Commission." *Lost or Damaged Freight Replacement*, 43 I.C.C. 257, 258; *Bills of Lading*, 52 I.C.C. 671, 685. Matters of carrier liability "are cognizable only in the courts" (*S. Landow & Co.* v. *Boston and M. R.*, 208 I. C. C. 669, 670), and the Commission is not empowered "to prescribe rules and regulations for the settlement of claims arising from loss or damage to shipments in transit" (*Rosser & Fitch* v. *A. C. L. R. R. Co.*, 91 I. C. C. 611).

In these earlier pronouncements, the Commission saw correctly that it could not substitute its judgment of convenience or reasonableness for the rule Congress declared applicable in every case. For the "shipper's right * * * is expressly provided for" in Section 20(11) and "[n]either the carrier nor the Commission could lawfully provide" for diminution of this right. *Toker Co.* v. *Lehigh Valley R. R. Co.*, 12 N.J. 608, 615.

2. It is clear from the Commission's own findings that enormous numbers of eggs shipped by rail give rise to no damage claims. Thus, even in the four eastern seaboard cities where rising damage claims were found to present a problem, the total of damaged eggs represented only 1.97% of the total received (*supra*, p. 6). Yet under the regulations the Commission has approved, carriers are to be absolved absolutely, instead of being absolutely

liable subject to limited exceptions, of any responsibility for three or five percent (in most cases) or one percent (in some cases) of damage to egg shipments.

The result is, to state the matter in its most extreme terms, that a railroad's employees could negligently or intentionally break the tolerance percentage in any shipment and leave the railroad free of liability. The regulations, therefore, go much further than merely to shift the burden of proof the Act places upon the carrier; they actually purport to establish as a matter of law that this burden is presumed to have been met in every case to the extent of the applicable tolerance.

The vice here is not merely that the "averages" and the "normal expectancies" the Commission adopted appear to be unduly generous (see pp. 35-39, *infra*). The fundamental error is the Commission's failure to recognize that Section 20(11) forbids the application of any such regulations at all. The individual railroad's liability under the Act is not an "average" liability to shippers generally; it is a liability in every particular case to the individual who is the "lawful holder" of a receipt or bill of lading "or to any party entitled to recover thereon." Being averages, the tolerance percentages by definition fall short in many cases of reflecting the "full actual" damage for which the carrier is liable under Section 20(11). In all such cases the regulations operate as forbidden limitations of liability.

This is not to deny, of course, that the railroad

proved would be invalid. For the Commission's report discloses no "valid basis" in adequate findings for its order. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654; *Atchison Ry.* v. *United States*, 295 U.S. 193, 201-202; *North Carolina* v. *United States*, 325 U.S. 507, 520.

Thus, for example, the Commission's grant of nation-wide tolerances contrasts vividly with its own finding that (1) only rail shipments to the east showed large damage claims, and (2) damage to eggs in shipments by motor truck was "negligible." No explanation is suggested for these discrepancies, nor is there any reason for simply granting tolerances instead of seeking further for ways to bring eastern rail shipments up to standards elsewhere in the nation or up to the standards of truck shipments. The result fails markedly to serve the purpose sought by both the common law and the Interstate Commerce Act through a rigorous standard of carrier liability—"to secure the utmost care in the rendering of a service of the highest importance to the community." *Santa Fe, P. and P. Ry. Co.* v. *Grant Bros. Constr. Co.*, 228 U.S. 177, 184-185.

The Commission's tolerances, based largely on the average percentage of damage it found to be undetected at the point of shipment, overlook the undisputed fact that at least a comparable amount escapes detection at the destination. Far from being a "reasonable" accommodation, this weighs the critical factor of human error wholly in the carrier's favor.

Another flaw is the utter absence of support for the conclusion that an average of one percent of the damage in receipts of egg shipments is due to "inherent defects." Examination of the Commission's report reveals that this figure was merely asserted, not proved, by the carriers. And the Commission had reached precisely the opposite conclusion in 1919. *National Poultry, Butter & Egg Assn. v. N. Y. Cent. Ry. Co.*, 52 I.C.C. 47, 54.

Similarly, the difference between the three percent tolerance for eggs packed at rail point of origin and the five percent tolerance for eggs packed elsewhere finds no justification in the Commission's report. Indeed, the pertinent evidence and findings strongly demonstrate that there should be no difference at all. For the Commission found that packing standards are substantially uniform, that off-rail packers usually carry their eggs to the railroad by truck, and that damage in truck transportation is "negligible." These findings leave the two percent difference at best inexplicable.

In sum, the Commission's order fails by its own test of "reasonableness," even apart from our primary argument that, however reasonable it might seem, a rule limiting the liability imposed by Section 20(11) is necessarily unlawful.

ARGUMENT

I

The Tariff Provisions Approved by the Commission, Relieving Railroad Carriers from Responsibility for Fixed Amounts of Damage to Shipments of Shell Eggs, Are Limitations of Liability Expressly Prohibited by Section 20(11) of the Interstate Commerce Act

The error of law we believe to underlie the decision of the Commission and the court below may be briefly epitomized: The Commission was concerned because damage claims paid in accordance with Section 20(11) of the Interstate Commerce Act were resulting in high losses to the railroads on egg shipments to the east. To remedy this situation, it approved a regulation which decreases the recoveries otherwise available under Section 20(11). In a word, it undertook to alter the statutory mandate, an action beyond its power. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U.S. 97; *Toker Co.* v. *Lehigh Valley R. R. Co.*, 12 N.J. 608.

Under the tolerance rules the Commission authorized, a shipper may deliver eggs free from damage to the carrier; through the carrier's gross negligence or some other cause for which the carrier is ordinarily liable, five percent of the eggs may be damaged; and, even if these facts are established, the carrier is wholly without liability. The result, we submit, flatly contradicts Section 20(11) of the Interstate Commerce Act. It is clear under this statute that a carrier is in every case absolutely liable for damage to goods it transports unless it

can sustain the burden of establishing, in each case, that the damage resulted from the act of God, inherent defect in the goods, or another of the five specific and limited excuses. Sharply reversing this unquestioned rule, the Commission here has not only relieved the carrier of its burden of proving non-liability, but, to the extent of the tolerances it authorized, has made it impossible for the shipper to recover even where he can show the carrier to have been at fault. The Commission's finding (R. 42) that the damage to rail-transported eggs "for which [the carriers] are not responsible *averages*"[5] the amount of the tolerances cannot justify this rule. For the unequivocal command of Section 20(11) guarantees to each individual shipper the right to recover for "the full actual loss, damage or injury to [his] property caused by" the carrier unless the latter can prove, in the particular case, a specific ground for non-liability.

A. *Section 20(11), codifying and strengthening the common law, imposes upon the carrier liability for the "full actual" damage to the goods shipped unless the carrier proves one of the specific causes relieving it of responsibility*

This settled rule under Section 20(11) was expressly acknowledged by the Commission in this case (R. 40), and neither is nor could be questioned here. Nevertheless, since our primary argu-

[5] Emphasis added.

ment is that the Commission misunderstood and failed to follow Section 20(11), it becomes necessary to summarize the history and scope of this provision.

Initially added to the Interstate Commerce Act by the Carmack Amendment of 1906 (34 Stat. 595), and "fortified" (*New York, N. H. & H. R. Co. v. Nothnagle*, 346 U. S. 128, 131) by the Cummins Amendment of 1915 (38 Stat. 1197), Section 20(11) provides in pertinent part that any common carrier subject to the Act receiving property for interstate transportation—

> shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it * * *; and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier * * * from the liability hereby imposed; and any such common carrier * * * shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon * * * for the full actual loss, damage, or injury to such property caused by it * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is

sought to be made is declared to be unlawful and void * * *.

Two undisputed effects of this statute are crucial to the issues in this case: First, it codifies the common law rule that a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by "(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or the nature of the goods." *Bills of Lading*, 52 I. C. C. 671, 679; *C. & O. Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 421-423; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509; *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, 372. Second, it declares unlawful and void any "rule, regulation, or other limitation of any character whatsoever" purporting to limit this liability or the amount of the shipper's recovery.

Shortly after enactment of the Carmack Amendment, this Court had occasion to define the liability imposed by the statutory reference to "loss, damage, or injury caused by" the carrier, and it was noted that this language "plainly implies a liability for some default in its common law duty as a common carrier." *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 507. Later, when an effort was made to read in the Amendment, as construed in *Croninger*, a contraction of the common law liability, the Court declared that neither *Croninger* nor "any other of our opinions holds that this

in a given case may be able to prove that acts of the shipper or some other excepted cause accounts for some or all of the damage in a shipment of eggs. It means only that averages expressed in tariff regulations may not substitute for such proof in any case.

To hold otherwise opens the door, as the dissenting judge observed (R. 144), to similar departures from Section 20(11) for all kinds of commodities. It could presumably be demonstrated that some average amount of damage in other kinds of goods shipped by rail results from acts of the shipper, inherent defects, or even acts of God. On the Commission's theory, it would seem to follow that such averages could become "tolerances" applicable in every case. While there is no indication that the Commission proposes any such wholesale mitigation of carrier responsibility, the fallacy suggested by such large-scale possibilities is no less present in the one instance involved here.

Moreover, even as applied in the single area of

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[8] It should be noted, however, that the Commission's reliance upon so-called "inherent defects" in eggs is erroneous. The "inherent vice" exception to carrier liability is applicable only in cases where damage arises solely from the nature of the property without intervening human agency—as in cases of loss or damages resulting from decay, fermentation, evaporation or natural shrinkage. See *e.g.*, *Austin* v. *Sea-Board R. Co.*, 188 F. 2d 239, 240-241 (C.A. 5); *Akerly* v. *Railway Exp. Agency*, 96 N.H. 396, 397-403, 77 A. 2d 856, 858-862; *Jackson & Perkins Co.* v. *Mushroom Transp. Co.*, 351 Pa. 583, 585-591, 41 A. 2d 635, 636-639, certiorari denied, 326 U.S. 733; *Watson Bros. Transp. Co.* v. *Domenico*, 118 Colo. 133, 137, 194 P. 2d 323, 325. The exception can have no application to shell eggs, which do not break without the application of external force.

egg shipments, the mitigation of the carrier's statutory liability accomplished by the Commission's theory is by no means unsubstantial. As we have noted, *supra*, pp. 6, 28, computations based upon the Commission's findings show that the total of eggs for which damage claims were filed in 1947, for the eastern seaboard cities revealing the largest incidence of claims, was less than two percent of the eggs received. Yet the tolerance percentages applied to these shipments under the tariff regulations are either three percent (packed at rail origin) or five percent (packed elsewhere), but in either event in excess of the average damage. It is to be noted, furthermore, that the tolerance percentage is a fraction of the shipment, not a fraction of the claim the holder of the bill of lading might otherwise recover. Thus, if the total damage claimed is ten percent, the five percent tolerance cuts the claim in half. And the Commission's expert testified that the regulations in operation served to take "anywhere from 35 to 40 percent off the face value of the claim" (R. 188; and see R. 482). This, clearly enough, is a vigorous revision of the situation of which the railroads had complained. Whatever its supposed wisdom (but see Point II, *infra*), this limitation of the liability imposed by Section 20(11) is unlawful.

This conclusion is not impaired by the fact—relied upon by both the Commission (R. 13-15) and the District Court (R. 121-122)—that in 1919, in an unreviewed and unimportant decision, the Commission authorized a five percent tolerance

rule for "current receipts" eggs—*i.e.*, "run-of-the-nest eggs as received at the farms, ranches, and packing plants, before candling, grading, segregation of damaged eggs, and repacking" (R. 19). *National Poultry, Butter & Egg Assn.* v. *New York Central R. Co.*, 52 I. C. C. 47. In issue there were broad five percent tolerance rules promulgated by the railroads (pp. 48-49). After hearing, the Commission ordered the rules revoked as "unreasonable," leaving them effective only with respect to "current receipts." As to these, the Commission noted (p. 49), it was "practically admitted by both the complainants [shippers] and the defendants [carriers], that it would be reasonable to continue to apply the 5 percent rule to shipments of current receipts * * *." Thus, this asserted precedent was practically stipulated by the shippers of eggs, who were appropriately unconcerned with the unimportant category of "current receipts" (see pp. 7 and 10, fn. 4, *supra*) and who prevailed in their primary effort, to defeat the tolerances with respect to the categories which were significant in rail shipments. Understandably, the decision was not appealed by the shippers.

Similar considerations minimize other "tolerance" decisions of the Commission referred to by the District Court (R. 122)—cases considering weight losses resulting from moisture evaporation and problems of so-called "scale tolerance." *Crouch Grain Co.* v. *A. T. & S. F. Ry. Co.*, 36 I. C. C. 265, reaffirmed, 41 I. C. C. 717; *Weight Tolerance Rule*, 192 I. C. C. 71; *Fuel Sales Corp.* v. *Delaware*,

L. & W. R. Co., 225 I.C.C. 288, 291. None of these decisions purported to establish an effective limitation upon carrier liability; indeed, the Commission expressly acknowledged in the *Crouch Grain* case (41 I. C. C. at 719) that "the carriers' liability for losses must be determined, not by the Commission, but by the courts." And when a carrier attempted in a recent action by a coal shipper to invoke a "moisture evaporation" tolerance to preclude recovery for an amount less than the tolerance, the attempt was tersely rejected by the New Jersey Supreme Court on the ground that it conflicted with Section 20(11). *Toker Coal Co. v. Lehigh Valley R. R. Co.*, 12 N.J. 608, 615.

This, after all, remains the decisive point, whatever the Commission may have contended possible in its few unreviewed decisions dealing with tolerances. Insofar as such decisions intend, or are relied upon, to limit the shipper's rights as defined in Section 20(11), they are unlawful and void.

II

The Commission's Order Is Unreasonable and Unsupported by Adequate Findings

We have urged as our primary argument against the Commission's order that it violates Section 20(11) and that its supposed reasonableness and convenience cannot cure this fatal infirmity. However, even on the Commission's own view of its powers, its order could not be sustained. For analysis reveals the lack of rational basis for the tolerances the Commission allowed—or, indeed, for any sys-

tem of nation-wide tolerances based upon the variety of national experience the record reveals. This deficiency would not only be sufficient, in any event, to invalidate the order on the ground that the Commission's report fails to disclose a "valid basis" for it. *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-202; *New York* v. *United States*, 331 U. S. 284, 301-310; *North Carolina* v. *United States*, 325 U. S. 507, 520. It serves, in addition, to show that even if it were open to choose between the undeviating policy of Section 20(11) and the exception the Commission has approved, the statute as written better serves the end of promoting a wise transportation policy.

1. Two facts found by the Commission cast a cloud over its premise that tolerances provide a reasonable means of solving the problem of damage claims in rail transportation of eggs: First, the finding of sharp differences between such claims on the eastern seaboard and elsewhere (R. 30), and, second, the finding that similar claims are negligible for eggs transported by truck (R. 39). The Commission specifically rejected the carriers' suggestion that receivers of eggs in the east, particularly in New York, are more critical than receivers elsewhere, thus accounting for the greater number of claims (R. 29-30). The Commission also found (R. 29) that the railroads "have done their utmost to eliminate the damages and little, if any, improvement may be expected from better loading practices." But remarkable by its omission is any indication of why rail shipments of eggs

outside the east should show little damage and why motor shipments everywhere should show practically none.

While such questions remain unanswered, it seems a poor solution to eliminate the need for answers by simply granting nation-wide tolerances to the railroads. The result eliminates the incentive eastern railroads would otherwise have to seek earnestly for the happier solution their western colleagues appear to have found. It assures the latter that their more successful efforts are to some degree superfluous. It diminishes, in short, the incentive provided by Section 20(11) and the common law standard it codified—"to secure the utmost care in the rendering of a service of the highest importance to the community." *Santa Fe, P. and P. Ry. Co.* v. *Grant Bros. Constr. Co.*, 228 U. S. 177, 184-185.

2. As the basis for its approval of the three and five percent tolerances, the Commission found (R. 42) that eggs packed for shipment contain a residual amount of undetected damage, and that shipment aggravates this undetected damage. Therefore, it concluded, of the amount of damage at destination, the origin damage plus the amount of aggravation must be eliminated to show the amount of damage for which the railroad is liable (*ibid.*). But the Commission's findings plainly show that the damage remained undetected at origin only because no commercially available method of inspection could detect it; for it also explicitly found that shippers strive for perfection

(*supra*, pp. 7, 8). At the same time the Commission found that the joint inspection at destination was "merely visual" and less exacting than the inspection by the packer at the origin (*supra*, p. 8). It would seem necessarily to follow that at least the percentage of damage escaping detection at the point of origin is overlooked at the destination. And this conclusion is squarely supported by other undisputed evidence reviewed by the Commission in its order. Thus, studies made of shipments after receipt showed residual damage, undiscovered by the joint inspection, at least equal to the average of undetected damage found to exist at the point of origin (*supra*, pp. 8-10).

The Commission concluded, nevertheless, that these studies, which disclosed the superficial nature of the inspections for damage at destination, indicated that the inspection at destination was "being performed with a view of detecting all damaged eggs" (R. 34), and that it was "reasonable" to credit the railroad with a tolerance for human error prior to shipment without any corresponding credit to the shipper for the demonstrated human error at destination. On this unsupported characterization of the inspection procedures, contrary to the evidence reviewed in the Commission's report, the carrier escapes liability for a fixed percentage of the damage discovered at destination plus the substantial percentage which remains undiscovered. This assertedly convenient accommodation—charging the shipper with the undetected damage at both ends of the journey—scarcely

seems a "reasonable" adjustment of the competing interests. Cf. *Smith* v. *Louisville & Nashville R. Co.*, 202 Iowa 292, 295. Its propriety would be doubtful even if Congress had not precluded any adjustment of any kind different from the requirements of Section 20(11).

3. The Commission's conclusion as to damage resulting from "inherent vice" is supported by no adequate finding or evidence disclosed in the present report, and is directly contrary to the Commission's findings on the same subject in 1919. *National Poultry, Butter & Egg Assn.* v. *N. Y. Cent. R. Co.*, 52 I.C.C. 47. In the instant case the Commission concluded that shell damage overlooked through human error becomes aggravated in transportation and causes damage to other, sound eggs (R. 42). This appears to be the sole basis for its approval of that portion of the contested regulation which specifies that, for Government-inspected shipments, the "tolerance" will be one percent in addition to the percentage of actual damage shown by the grading certificate (R. 41-42). To an unspecified extent, it is the partial basis of the other percentages (R. 41). The whole of the discussion of the "inherent nature" of eggs in the Commission's order (R. 41) and the opinion of the District Court (R. 122) revolves about this "normal expectancy" of further damage to weakened shell structures (see, *e.g.*, R. 41, R. 118-119).

But while the Commission concluded that the "slightest movement in transportation may cause additional damage" to weakened eggs (R. 42), it

nowhere indicated any finding or evidence upon which it calculated the amount of additional damage resulting from this source. Testimony by the principal railroad witness (Jensen, R. 286) showed that no tests had been made of the shocks checked eggs could withstand. The sole reference in the Commission's order to the basis for its calculation is the statement that "respondents [the carriers] take the position that * * * the normal expectancy of damage in transit due to the inherent nature of the eggs * * is approximately 1 percent" (R. 41).

In 1919, however, after a hearing on egg damage problems, the Commission had expressly found it improper to conclude that "cracked eggs * * * may reasonably be expected to develop into broken eggs by the necessary and ordinary shocks of transportation." *National Poultry, Butter & Egg Assn. v. N.Y. Cent. R. Co., supra,* at 54. This was based upon testimony "as to the experiments with cases containing cracked eggs which were subjected to shocks similar to those received in railroad transportation" which indicated "that cracked eggs resist shocks almost as well as sound eggs" (*ibid.*).

Without reference to the earlier proceedings, and, more importantly, without any indication of a factual basis for its calculation, other than the assertion of the carriers, the Commission has concluded now that damage from this "inherent vice" is one percent.

4. In yet another respect, the Commission's conclusions depart from the facts disclosed in its report. The order approves a "tolerance" percent-

age of three percent for all eggs packed at the point of rail shipment; and also finds "reasonable" a five percent figure for shipments packed at off-rail points. There are, however, no findings, and there was no evidence, supporting the assumption that the damage concealed in the latter shipments is over 66 percent greater.

In fact, such evidence as the report considers on this subject demonstrates that the difference in rail-point-of-origin damage between the two types of shipments is at most unsubstantial. The report indicates that there is no difference in packing procedures or standards between packers at off-rail points and those located on the railroad (R. 30). The Commission noted that shipments packed at off-rail points are usually "trucked" to the point of rail shipment (R. 32, 36), and "in the transportation of eggs by motor truck the amount of shell damage is negligible" (R. 39). Similarly, Army experience with truck shipments was cited as showing "about 0.14 percent" of the shipments damaged (R. 39). Thus, the finding as to packing procedures and carriage to the railroad weigh heavily toward the conclusion that off-rail shipments are turned over to the railroad in substantially the same condition as shipments packed at the rail point of origin. Yet without countervailing findings and with no indication of its reason for the distinction, the Commission ordered a five percent tolerance for the former as against a three percent tolerance for the latter.

In short, the report, on its own premises, woul require the Court "to rescue the Commission from the deficiency of its own findings. *Unite States* v. *Champlin Rfg. Co.*, 341 U.S. 290, 301; se also *Secretary of Agriculture* v. *United States*, 34 U.S. 645, 654. Even if the premises were not con trary to Section 20(11) of the Act, the order woul be invalid.

CONCLUSION

For the foregoing reasons, the judgment of th District Court should be reversed, and the orde of the Commission should be set aside and enjoine

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APPENDIX

Section 20(11) of the Interstate Commerce Act (34 Stat. 595, as amended, 49 U.S.C. 20(11)) provides:

> That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or

from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory; or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws

and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not so far as relates to values, be held to be a violation of section 10 of this part to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Com-

mission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the no-

tice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this part provided.

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